

1 COLETTE VOGELE (SBN No. 192865)
 2 Email: colette@vogelegal.com
 3 BENJAMIN COSTA (SBN No. 245953)
 4 Email: ben@vogelegal.com
VOGELE & ASSOCIATES
 5 580 California Street, Suite 1600
 6 San Francisco, CA 94104
 7 Tel: (415) 751-5737
 8 Fax: (415) 358-4975

9 Attorneys for Plaintiff
 10 VIOLET BLUE

11
 12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 SAN FRANCISCO DIVISION

15 VIOLET BLUE, an Individual,
 16 Plaintiff,

17 v.

18 ADA MAE JOHNSON a/k/a ADA
 19 WOOFINDEN, an individual d/b/a
 20 VIOLET BLUE a/k/a VIOLET a/k/a
 21 VIOLET LUSTR; VIOLET BLUE, INC., a
 22 California Corporation; and DOES 1-10,

23 Defendants.

24 Case No. C 07-5370 MJJ

25 **PLAINTIFF'S MOTION FOR LEAVE
 26 PURSUANT TO FED. R. CIV. P. 15(a) TO
 27 AMEND COMPLAINT**

28 Hon. Judge Jenkins
 Courtroom 11, 19th Floor
 450 Golden Gate Avenue
 San Francisco, CA 94102

Hearing Date: January 29, 2008

Hearing Time: 9:00 a.m.

20 **NOTICE OF MOTION**

21 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

22 PLEASE TAKE NOTICE that on January 29, 2008, at 9:00 a.m., or as soon thereafter as
 23 this matter may be heard by the above-entitled Court, located at 450 Golden Gate Avenue, San
 24 Francisco, California, in Courtroom 11 (19th Floor) of the Honorable Martin J. Jenkins, Plaintiff
 25 Violet Blue will and hereby does move the Court pursuant to Federal Rule of Civil Procedure
 26 15(a) for leave to file a First Amended Complaint to add Assassin Pictures, Inc.,
 27 AssassinCash.com, Five Star Distribution Company LLC, and Bill Fox as additional defendants
 28 to this action. [See Declaration of Colette Voge (‘Voge Decl.’), Exh. 1 (Proposed First

1 Amended Complaint).] This motion is based upon this Notice of Motion, the accompanying
 2 Memorandum of Points and Authorities, the proposed First Amended Complaint, the pleadings
 3 and papers on file, and such other arguments as may be presented in the Reply and at the hearing.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. INTRODUCTION AND STATEMENT OF FACTS**

6 Plaintiff Violet Blue initiated this action just two months ago, on October 22, 2007,
 7 alleging causes of action for trademark infringement, trademark dilution, violation of Plaintiff's
 8 right of publicity, and unfair competition. [Complaint, *filed* Oct. 22, 2007 ("Complaint").]
 9 Plaintiff's Complaint alleges these causes of action against Defendant Ada Mae Johnson, an
 10 individual, Violet Blue Inc., a California corporation, and ten Doe defendants.

11 The Complaint was personally served on Defendant Johnson on October 23, 2007.
 12 Thereafter Defendant Johnson contacted Plaintiff's counsel by telephone. [Vogelee Decl., ¶ 4.]
 13 Plaintiff's counsel cautioned Johnson to obtain legal counsel before responding to the complaint.
 14 [Id.] Several days later, Johnson contacted Plaintiff's counsel by email. In response, counsel for
 15 Plaintiff again encouraged Johnson to obtain legal counsel and informed Johnson of resources
 16 for finding pro bono counsel in her area if she could not afford to pay for an attorney. [Id. & Exh.
 17 3.] Plaintiff's counsel also informed Johnson by email that she would have until November 12,
 18 2007, to respond to the Complaint. [Id.]

19 Defendant Johnson thereafter submitted a "Response" to the Complaint (herein
 20 "Answer") by placing a copy in the mail to Plaintiff and (presumably) to this Court, and also by
 21 emailing portions of the Answer to counsel.¹ The Answer identifies several facts that raise new
 22 issues in this matter, including the need to add at least four new defendants to this action. For
 23 example, Defendant's answer includes the following admissions and statements:

24 ///

25
 26
 27 ¹ On November 7, Defendant Johnson emailed the Answer and Exhibits E and G of her Answer
 28 to Plaintiff's counsel. A few days later, Plaintiff's counsel received by mail a printed and signed
 copy of Defendant Johnson's Answer and four exhibits. Defendant's Answer (with four exhibits)
 was entered into the Court's docket on November 13, 2007. [Answer, (Docket No. 6).]

- 1 • Defendant admits that “Violet Blue, Inc.” was fictitiously identified by her
- 2 “webmaster” in the domain registration when she obtained the domain name
- 3 VioletBlue.org. [Answer, ¶ 3].
- 4 • Defendant entered contracts relevant to this action with the Exotic Erotic Ball, an
- 5 entity located in South San Francisco, California and, as recently as October,
- 6 2006, Defendant co-hosted and performed in South San Francisco, California, for
- 7 the Exotic Erotic Ball. [*Id.*, ¶¶ 6, 13.]
- 8 • Defendant performed under the name “Violet Blue” in movies filmed in
- 9 California. [*Id.*, ¶ 11.]
- 10 • Defendant distributes her films through Five Star FC. [*Id.*, ¶ 12.]
- 11 • Defendant was aware of the potential for public confusion as a direct result of her
- 12 use of the name “Violet Blue”. [*Id.*, ¶ 19, 26.]
- 13 • Defendant admits that Dave Pounder read a news article about Plaintiff’s work
- 14 and contacted Defendant under the mistaken belief that the news article was about
- 15 Defendant. [*Id.*, ¶ 20.]
- 16 • Defendant admits to receiving emails wherein the senders had confused
- 17 Defendant with Plaintiff. [*Id.*, ¶ 26].

18 In light of these and other facts stated in Defendant’s Answer, and based upon Plaintiff’s
 19 further investigation of facts relevant to the entity Violet Blue Inc. and the ownership of
 20 Defendant’s website, VioletBlue.org,² Plaintiff seeks leave to amend the Complaint to name four
 21 of the Doe defendants included in the Complaint and to add relevant factual statements regarding
 22 these additional defendants: Assassin Pictures, AssassinCash.com, Five Star Video L.C., and Bill
 23 Fox.

24 ² Violet Blue Inc. is a California corporation and, at the time of the filing of this action, was
 25 identified as the “registrant” of Defendant Johnson’s website, VioletBlue.org. [Vogelee Decl., ¶ 7
 26 & Exh. 4.] After serving the Complaint, Plaintiff was informed that Violet Blue Inc. has no
 27 involvement with the VioletBlue.org website, and that the domain registration was falsely made
 28 in its name. [*Id.*, ¶ 8 & Exh. 5.] Violet Blue Inc. thereafter issued a cease and desist letter to
 Defendant Johnson. [*Id.*.] Recently, the VioletBlue.org website registration has changed to the
 name of “David Clairborne” as the “registrant” with an address that matches Defendant
 Johnson’s PO Box. [*Id.*, ¶ 9-10 & Exhs. 6 & 7.] Based on this information, Plaintiff has agreed to
 dismiss without prejudice named defendant Violet Blue Inc. simultaneously with this motion.

To date, a case management scheduling order has not been entered in this case. The proposed amendments create no new legal theories and assert no new material facts to the prejudice of Defendant Johnson. Counsel for Johnson³ would not consent to the amendment of the Complaint, and therefore Plaintiff now moves for leave to amend. For the reasons stated more fully below, Plaintiff's requested amendment is entirely justified under the liberal standards governing amendments to pleadings.

II. LEAVE TO AMEND SHOULD BE GRANTED BECAUSE THE CASE IS AT A VERY EARLY STAGE AND THE PROPOSED AMENDMENT WILL NOT PREJUDICE DEFENDANTS.

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend "shall be freely given when justice so requires," Fed. R. Civ. P. 15(a). District courts have discretion in granting motions to amend, and the provision "leave shall be freely given" is a "mandate [] to be heeded." *Foman v. Davis*, 371 U.S. 178, 812 (1962).

Rule 15 is designed to facilitate amendment, except when prejudice to the opposing party would result. *United States v. Hougham*, 364 U.S. 310, 316 (1961). In deciding whether to grant leave to amend, the court takes several factors into account: "(1) whether the movant unduly delayed in bringing the motion, (2) evidence of bad faith or dilatory motive on the part of the movant; (3) the movant's repeated failure to cure deficiencies by previous amendments; (4) prejudice to the opposing party; and (5) futility of amendment." *G & C Auto Body Inc. v. Geico General Insurance Company*, 2007 WL 3306629, slip op. (N.D. Cal. 2007) (Jenkins, J.); *citing to DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). Unless prejudice is shown, or a strong showing of one of the remaining factors, there is a presumption under Rule 15(a) in favor of granting leave to amend. *G & C Auto Body Inc.*, 2007 WL 3306629, slip op.; *citing to Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Prejudice under Rule 15 means "undue difficulty in prosecuting [or defending] the lawsuit as a result of the change in tactics or theories." *Smith v. Guaranty Service Corp.*, 51 F.R.D. 289, 293 (N.D. Cal. 1970); *citing to Deakyne v. Commissioners of Lewes*, 416 F.2d 290, 300 (3d Cir. 1969).

³ On November 9, 2007, Plaintiff's counsel received a phone call from Robert Apgood, an attorney licensed in Washington State, stating that he would be representing Defendant Johnson in this litigation. [Vogelee Decl., ¶ 6.]

1 A. As The Case Is In The Very Early Stage, Plaintiff Has Not Delayed in Filing This
 2 Motion to Amend.

3 As explained above, Plaintiff brings this motion for leave to amend without undue delay
 4 following the receipt of Defendant Johnson's Answer, filed November 13, and after further
 5 investigation into the true names and identities of those affiliated with Defendant's website
 6 VioletBlue.org based on Defendant Johnson's Answer and admissions. Plaintiff's counsel
 7 informed Defendant Johnson's counsel on December 5 of Plaintiff's need to amend the
 8 Complaint. Defendant's counsel refused to grant such consent. [Vogeles Decl., ¶ 11.] Therefore,
 9 Plaintiff brings this motion without undue delay because Plaintiff has only recently become
 10 aware of the true names and identities of these new defendants, their relationship with Defendant
 11 Johnson, and their complicity with the violations of Plaintiff's trademark rights, right of publicity
 12 and unfair competition. Moreover, less than six (6) weeks have passed since the time Defendant
 13 Johnson's Answer was entered in the Docket. *See SAES Getters S.p.A. v. Aeronex, Inc.*, 219
 14 F.Supp.2d 1081, 1096 (S.D. Cal. 2002) (Granting plaintiff's motion to amend the complaint
 15 where five months had elapsed between defendant's answer and plaintiff's motion, particularly
 16 because no proceedings had taken place in the interim); *see also DCD Programs, Ltd. v.*
 17 *Leighton*, 833 F.2d 183, 188 (9th Cir. 1987) (Holding that plaintiff's motion to amend the
 18 complaint (in this case, the fourth amended complaint) was improperly denied because a 14-
 19 month delay was insufficient to demonstrate undue delay.).

20 B. Plaintiff Brings This Motion Without Bad Faith or Dilatory Motive.

21 Moreover, Plaintiff filed this motion without bad faith or dilatory motive. *Foman v.*
 22 *Davis*, 371 U.S. 178, 182 (1962); *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052
 23 (2003); *G & C Auto Body Inc. v. GEICO General Ins. Co.*, 2007 WL 3306629, slip op. (N.D.
 24 Cal. 2007) (Jenkins, J.). Plaintiff's post-filing investigation revealed legitimate grounds for
 25 adding the new defendants as the parties previously alleged as Does, and specifically as a result
 26 information learned from Defendant Johnson and Defendant VBI.

27 Assassin Pictures, Inc. ("AP") operates AssassinPictures.com and Assassin Cash ("AC"),
 28 and both are internet companies that facilitate creation of commercial, pornographic websites,

1 specifically the VioletBlue.org website where Defendant Johnson's illicit content is displayed,
 2 promoted, and sold in violation of Plaintiff's rights. [Vogelee Decl., ¶¶ 12-16, Exhs. 8-12.] AP
 3 and AC make available to their customers advertising content including links and banner ads for
 4 VioletBlue.org, which generate revenue for AP and AC as a direct result of the infringing
 5 content found at VioletBlue.org. [See, e.g., *Id.*, ¶ 16 & Exh. 12 (banner advertising)].

6 Moreover, Five Star Distribution Company LLC ("Five Star") operates an internet
 7 company that facilitates creation of virtual "adult super stores" to sell pornographic DVD and
 8 VHS movies, and adult toys. Five Star is a distributor that receives revenue for each movie and
 9 toy sold in its virtual stores. [See *Id.*, ¶ 17 & Exh. 13.] According to Defendant Johnson's
 10 Answer, "Five Star Video (www.fivestarfc.com) set up, ran and maintained the Defendant's
 11 online store www.movies.violetblue.org." [Answer, ¶ 12.] It is through this "online store" that
 12 pornographic films featuring Defendant Johnson using Plaintiff's trademark, name "Violet Blue"
 13 and likeness are sold to the public, including in California and in this Judicial District.

14 Finally, Bill Fox is the registered owner of AssassinCash.com, the website that supports
 15 and receives revenue from the infringing images, name, and persona portrayed at VioletBlue.org,
 16 and is provided as the technical contact and/or general contact for both AssassinPictures.com and
 17 AssassinCash.com. [Vogelee Decl., ¶¶ 18-20 & Exhs. 14-16]. Through his involvement with these
 18 websites, Mr. Fox assists the websites in making the infringing content and receiving revenue as
 19 a result of the portrayal of the Plaintiff's trademark, name, likeness and persona at
 20 VioletBlue.org. Moreover, Defendant Johnson has asserted in a conversation with Plaintiff's
 21 counsel on October 25, that Bill Fox "hosts" the VioletBlue.org website and that Mr. Fox
 22 receives payments based on sales of content from the website. [*Id.*, ¶ 4.] Finally, "Bill Fox" is
 23 identified as the custodian of record under 18 U.S.C. § 2257 on the VioletBlue.org website, an
 24 important federal compliance role for the sexually explicit website. [*Id.*, ¶ 20 & Exh. 16.]

25 Accordingly, Plaintiff's motion is filed in good faith and without dilatory motive because
 26 each of the new defendants profits directly from the distribution of content under the name
 27 "Violet Blue" causing confusion among members of the public between Plaintiff Violet Blue, an
 28 accomplished, prolific, and mainstream sex-positive writer and speaker, and the adult film

1 actress Defendant Johnson who has impermissibly assumed Plaintiff's name and persona for her
 2 pornographic acting.

3 C. Plaintiff Has Not Previously Failed to Cure Defects.

4 This is Plaintiff's first motion to amend the complaint. Accordingly, Plaintiff's motion
 5 for leave to amend cannot be denied on the basis of a previous failure to cure.

6 D. Adding Four New Defendants Will Not Prejudice Defendant Johnson.

7 Defendant Johnson will not suffer prejudice as a result of the addition of these four new
 8 defendants. The party opposing the amendment has the burden of showing prejudice. *DCD*
 9 *Programs, Ltd*, 833 F.2d at 187 (9th Cir. 1987). It is well settled in the Ninth Circuit (and others)
 10 that “[b]ald assertions of prejudice cannot overcome the strong policy reflected in Rule 15(a) to
 11 ‘facilitate a proper disposition on the merits.’” *Amerisource Bergen Corp. v. Dialysist West,*
 12 *Inc.*, 465 F.3d 946 (9th Cir. 2006) (citing to *Hurn v. Ret. Fund Trust of the Plumbing, Heating &*

13 *Piping Indus.*, 648 F.2d 1252, 1254 (9th Cir. 1981) (quoting *Conley v. Gibson*, 355 U.S. 41, 48
 14 (1957)); see also *Eminence Capital*, 316 F.3d at 1052 (“A simple denial of leave to amend
 15 without any explanation by the district court is subject to reversal. Such a judgment is ‘not an
 16 exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the
 17 Federal Rules.’” (quoting *Foman*, 371 U.S. at 182)). Here, Defendant was surely aware of the
 18 important roles that these four new defendants played during her operation of the website
 19 *VioletBlue.org*. Given the very short time since the Complaint and Answer were filed, and given
 20 the fact that Defendant's counsel has not responded to Plaintiff's counsel's request for dates
 21 upon which to conduct a Rule 26(f) meeting with Plaintiff's counsel, Defendant cannot argue
 22 prejudice by the addition of these new defendants.

23 E. Plaintiff's Amendments Are Purposeful and Serve the Interests of Justice.

24 Finally, Plaintiff's amendments are not futile. “Before discovery is complete, a proposed
 25 amendment is ‘futile’ only if no set of facts can be proved under the amendment that would
 26 constitute a valid claim or defense.” *Miller v. Rykoff-Sexton, Inc.* 845 F2d 209, 214 (9th Cir.
 27 1988). Plaintiff has asserted viable trademark infringement, trademark dilution, violation of right
 28 of publicity, and unfair competition causes of action against Defendant Johnson as demonstrated

1 in the Complaint and Defendant Johnson's Answer. The same causes of action have been
2 asserted against each of the four new defendants in the (Proposed) First Amended Complaint, as
3 a result of Defendant's Answer and Plaintiff's further investigation. In light of these facts,
4 Plaintiff argues the First Amended Complaint asserts valid claim against the new defendants.

5 Moreover, Plaintiff is seeking injunctive relief and monetary damages in this action
6 which cannot be fully accorded without adding these defendants. The Ninth Circuit has
7 consistently found that the aim in seeking to accord "complete relief" is to preclude multiple
8 lawsuits on the same cause of action. *Disabled Rights*, 375 F.3d at 879 (9th Cir. 2004). The
9 Court could not accord Plaintiff complete injunctive relief without joining AP, AC, Five Star,
10 and Bill Fox as defendants because, absent a finding that these defendants were in active concert
11 or participation with Defendant, they would not be automatically bound by an injunction
12 prohibiting the continued proliferation of the infringing images, name, and persona at
13 VioletBlue.org. Fed. R. Civ. Pro. 65(d). Similarly, in the context of monetary damages, Plaintiff
14 could not obtain complete relief unless each of these new defendants who have received revenue
15 in connection with use of the name, image, and persona Violet Blue is added as a party in this
16 action.

17 In conclusion, the addition of the four new defendants will enable the Court to accord
18 Plaintiff complete relief, and because no prejudice befalls Defendant as a result of this
19 amendment, the interests of justice require that leave to amend be granted. *Foman*, 371 U.S. at
20 812; *see also Hougham*, 364 U.S. at 317 (the purpose of pleading is to facilitate a proper decision
21 on the merits) (citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

22 ///
23 ///
24 ///
25 ///
26 ///
27 ///
28 ///

1 III. CONCLUSION

2 For the reasons stated above, the Court should grant Plaintiff's Motion and allow the
3 filing of their First Amendment Complaint [Vogeles Decl., Exh. 1].

4 Dated: December 21, 2007

VOGELE & ASSOCIATES

7 By:/S/ Colette Vogeles

Colette Vogeles

8 Attorneys for Plaintiff VIOLET BLUE